IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1716 OF 2003

1. Vijay Narayan Uttekar,)

2. Narayan Ambaji Uttekar,)

3. Shevanti Narayan Uttekar,)
Accused No.1 to 3 are residing)
at 2, Kashidham, Tisgaon Naka,)
Bombay - Pune Link Road,)
Kalyan (E).)

4. Savita Anil Patil,)
Residing at Post : Nerle,)
Tal : Rajapur, Dist. Ratnagiri.)

5. Sarika Kisan Khedekar,)
Residing at A/5/307,)
Sector No.24, Nerul (W),)
New Bombay.)

6. Sujata Ajay Ruke- Pawar,)
Residing at Sidheshwar Seva Sangh)
Sidharth Nagar, Gajanan Maharaj)
Mandir Marg, Bhatwadi,)
Ghatkopar (East),)
Mumbai - 400 084.)..Petitioners
(Org.Accused)

Vs.

1. State of Maharashtra,)
Through its office of Public)
Prosecutor, Ground Floor,)
High Court Building Compand,)
High Court, Fort,)
Mumbai.)

2. The Senior Police Inspector)
Incharge of the Bhandup Police)
Station, Bhandup, Mumbai.)..Respondents

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Shri Vipin H. Kamdi for the Petitioners.

Shri B.H.Mehta, APP for Respondent No.1.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 10th February, 2005.

JUDGMENT :

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioners challenge the order dated 16th October, 2003 passed by the Learned Additional Sessions Judge, Mumbai, in Sessions Case No.644 of 1996.

3. The facts relevant for the decision are that, pursuant to the complaint lodged by the mother of the deceased - wife of the petitioner No.1 and consequent to the investigation carried out thereafter, the sessions case came to be registered as Sessions Case No.644 of 1996 wherein the petitioners had filed an application for discharge, which came to be rejected on 14th August, 2003. When the matter was fixed on 16th October, 2003 for framing of charge, the prosecution sought to produce two additional statement of the witnesses dated 10th September, 2003, being the

additional statement of the father of the deceased, and the statement dated 20th August, 2003 of one Subhada Babu Dalvi, the previous neighbour of the Petitioners. The same was objected to by the petitioners, however, the Learned Additional Sessions Judge overruled the objection and allowed the production of the said two additional statement of the witnesses.

4. The impugned order is sought to be challenged on the ground that there was no prior leave or permission obtained from the Learned Magistrate for collecting the additional statement of the witnesses by the investigation officer, and therefore, any such material collected after the submission of the report to the Learned Magistrate without the leave of the Court cannot be entertained. It is further contention of the petitioners that re-investigation can be ordered only if there are new and fresh facts revealed to the investigation officer and that is not the case in the matter in hand. Allowing such additional statement would virtually amount to allowing the investigating agency to cure the defects in the investigation by resorting to illegal method. It is the contention of the petitioners that in terms of Section 173(8) of the Code of Criminal Procedure,

1973, only re-investigation and production of the supplementary charge sheet are permitted and not the additional statement of the witnesses, and that too with the prior permission of the Court in terms of Section 173(3) of the Code of Criminal Procedure. Reliance is sought to be placed in the decision in the matter of **Smt.Pusparani Samal v. Suretha Kumar Biswal and Ors.,** reported in 1998 Cri.L.J.3764 (Orissa), of **Gobardhan Das and Ors. v. State of Orissa,** reported in 2000 Cri.L.J. 1641 (Orissa), and of **Prithwis Kumar Nag v. State of West Bengal and Ors.,** reported in 1998 Cri.L.J. 3502 (Calcutta) in support of the contentions sought to be raised in the matter.

5. The respondents, on the other hand, have sought to contend that there is no bar under the Code to submit additional statement or to disclose any further investigation and the provisions of law comprised under Section 173(8) of the Code of Criminal Procedure, specifically permit such further investigation. Reliance is sought to be placed in the decision of the Apex Court in **Central Bureau of Investigation v. R.S.Pai and Anr.,** reported in (2002) 5 SCC 82.

6. It is not in dispute that the investigating

agency has sought to produce two additional statement of the witnesses after filing of the charge sheet and committal of the case in the Sessions Court. It is also a matter of record that the same were produced before framing of the charge in the matter.

7. Section 173 of the Code of Criminal Procedure, 1973 deals with the subject of report of the police officer on completion of the investigation. It requires the investigation to be completed without unnecessary delay and on completion, the report to be submitted to the State Government in the prescribed form. It requires the officer in-charge of the police station to forward the report to the Learned Magistrate empowered to take cognizance of the matter on the police report disclosing the names of the parties, nature of the information, names of the persons who appear to be acquainted with the circumstances of the case, whether any offence appears to have been committed and, if so, by whom, whether the accused has been arrested, whether the accused has been released on his bond and, if so, whether with or without sureties, and whether the accused has been forwarded in custody under section 170 of the Code, but the officer is also required to communicate the action taken by him in the matter to the person, if

any, by whom the information relating to the commission of the offence was first given. Sub-section (5) of Section 173 provides that when such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation as well as the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses. In order to appreciate the arguments sought to be canvassed in the matter, it will be worthwhile to reproduce the two sub-sections of Section 173 of the Code, viz. sub-section (3) and sub-section (8). Sub-section (3) reads thus:-

> "(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer-in-charge of the police station to make further investigation."

Sub-section (8) reads thus:-

> "(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed, and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

8. Plain reading of the above provisions of law would reveal that in cases where the provisions of Section 170 applies, the investigation officer has to forward all the documents collected in the course of investigation to the Magistrate along with the charge sheet. As far as the statement of the persons recorded under Section 161 are concerned, certain amount of discretion is given to the investigation

officer whereby only those statements recorded under Section 161 of those persons, are required to be forwarded to the person to whom the prosecution proposes to examine as the witness in the case. Clause (b) of sub-section (5) of Section 173 clearly provides that "the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses." In other words, it is not necessary to forward all the statements which were recorded under Section 161 but only those statements which the prosecution proposes to examine the persons as witnesses, and if there are statements, which are not relevant for the establishment of the offences for which the accused is being chargesheeted but perhaps were of some help in the course of investigation, may not necessarily be sent to the Magistrate in case such persons are not at all required to be examined by the prosecution.

9. The provisions of sub-section (8) further discloses that the submission of the report and the charge sheet along with the materials collected in the course of investigation does not put fetter on the powers of the investigation officer to produce further evidence in the matter, if available to him after filing of the charge sheet. In fact, no limitation in

that regard is prescribed under sub-section (8) which clearly provides that the submission of the charge sheet would not be deemed to preclude further investigation in respect of an offence in relation to which the report has been forwarded to the Magistrate under sub-section (2) of Section 173 of the Code of Criminal Procedure. It further provides that any such evidence which comes to the notice of the office in-charge of the police station can be forwarded to the Magistrate, albeit, the provisions of sub-sections (2) to (6) shall as far as they apply in relation to the report which is submitted under sub-section (2) would also apply in such cases.

10. As rightly submitted by the learned APP, the Apex Court had an occasion to deal with the provisions of sub-section (8) of Section 173 of the Code in **R.S.Pai's case (supra)**, and it was held therein that normally the investigation officer is required to produce all the relevant documents at the time of submitting the charge sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. It was held that if some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge sheet,

it was always open to the investigating officer to produce the same with the permission of the Court. It was specifically ruled that "In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word "shall" used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently." It was further held that "the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused."

11. Obviously, therefore, the law on the point of power of the Court to allow the investigating

machinery to produce further evidence if comes to light after filing of the charge sheet is well settled and there are no bar imposed in that regard on the power of the Court. Indeed, the provisions of law comprised under Section 173(8) of the Code are very clear in that regard, and therefore, merely because the additional statements which are recorded subsequent to the filing of the charge sheet were sought to be produced and were allowed by the Learned Additional Sessions Judge and that too even before framing of the charge, no fault can be found with the impugned order nor it can be said to have been passed either in arbitrary or in improper exercise of its jurisdiction.

12. As regards the sub-section (3) of Section 173 of the Code of Criminal Procedure, the contentions raised in that regard are totally devoid of substance. In fact, the said provision would not at all be attracted in the case in hand. That would apply in cases where a superior officer of police is appointed by the State Government and the said provision nowhere imposes any restriction on the powers exercisable by the authorities under sub-section (8) of Section 173 of the Code of Criminal Procedure, 1973.

13. The decision in **Gobardhan Das's case (supra),** wherein the Orissa High Court had deprecated an attempt to reopen investigation as the same was done with an oblique motive to help opposite party to get rid of the case, is on the point that the provision of Section 173(8) does not vest the investigating agency with unbridled power to reinvestigate and rope in any person without sufficient evidence to proceed against.

14. The decision of Calcutta High Court **in Prithwis Kumar Nag's case (supra),** is totally on the different point wherein it was held that under the guise of exercise of powers under Section 173 of the Code of Criminal Procedure, the investigating agency is not entitled to rope in any person without sufficient evidence to proceed against him.

15. In **Pusparani Samal's case (supra)**, subsequent reopening of the investigation was without any basis or material on record and therefore, it was held that the power to reopen was misutilised. Apparently, none of the decisions relied upon by the petitioners' Advocate are of any help to the petitioners to assail the impugned order.

16. In fact, the Apex Court in **Ram Lal Narang v.**

State (Delhi Admn.), reported in AIR 1979 SC 1791, has held that notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Section 173, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. It was further observed that there was no provision in the Code, expressly or by necessary implication, which could bar the right of the police authorities to further investigate after cognizance of the case had been taken by the Magistrate. None of the provisions state that the power of the police to further investigate stands exhausted by the Magistrate taking cognizance of the offence. On the contrary, practice, convenience and preponderance of authority permits repeated investigation on discovery of fresh facts.

17. For the reasons stated above, therefore, no fault can be found with the impugned order and hence the petition fails and is hereby dismissed. Rule is discharged with no order as to costs.